

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Original

74-2129

To be argued by
ARLENE R. SILVERMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA *ex rel.* JOSEPH POWELL,
Petitioner-Appellant,
against

THE HONORABLE J. EDWIN LaVALLEE, Superintendent,
Clinton Correctional Facility, Dannemora, New York,
Respondent-Appellee.

BRIEF FOR RESPONDENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellant
2 World Trade Center
New York, New York

Of Counsel

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General

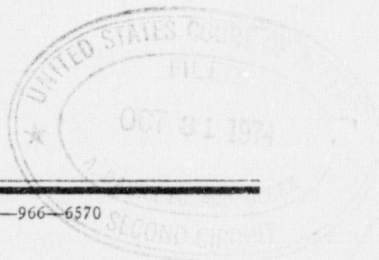


TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement	1
Facts	2
The Hearing	2
Opinion Below	10
ARGUMENT—The police had probable cause to arrest petitioner, properly entered apartment 3H at 1874 Loring Avenue, and constitutionally seized evidence therein	12
Conclusion	19

TABLE OF CASES

<i>Aguilar v. Texas</i> , 378 U.S. 108, 114 (1964)	16
<i>Draper v. United States</i> , 358 U.S. 307 (1959)	15, 18
<i>Jones v. United States</i> , 271 F. 2d 494, (D.C. Cir. 1959)	16
<i>Ker v. California</i> , 374 U.S. 23 (1963)	19
<i>Lefkowitz v. Newsome</i> , 73-1627	12
<i>Rodgers v. United States</i> , 267 F. 2d 79 (9th Cir. 1959)	16
<i>Sabbath v. United States</i> , 380 F. 2d 108 (9th Cir. 1967), cert. den. 389 U.S. 1003 (1967)	16

	PAGE
<i>Smith v. United States</i> , 385 F. 2d 34 (5th Cir. 1967) ..	15
<i>Spinelli v. United States</i> , 393 U.S. 410 (1969)	16, 17, 18
<i>United States v. Acarino</i> , 408 F. 2d 512 (2d Cir. 1969), cert. den., 395 U.S. 961 (1969)	18
<i>United States v. Acosta</i> , 411 F. 2d 627 (5th Cir. 1969)	15
<i>U.S. v. Canieso</i> , 470 F. 2d 1224 (2d Cir. 1972)	13, 14
<i>U.S. v. Commission</i> , 429 F. 2d 834 (2d Cir. 1970)	16
<i>United States v. Irby</i> , 304 F. 2d 280 (4th Cir. 1962), cert. den. 375 U.S. 958 (1963)	15, 16
<i>U.S. v. Manning</i> , 448 F. 2d 992 (2d Cir. 1971)	13, 16
<i>U.S. ex rel. Newsome v. Malcolm</i> , 492 F.2d 1166 (2d Cir. 1974)	12
<i>United States v. Ventresca</i> , 380 U.S. 102 (1965)	17

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA *ex rel.* JOSEPH POWELL,
Petitioner-Appellant,
against

THE HONORABLE J. EDWIN LaVALLEE, Superintendent,
Clinton Correctional Facility, Dannemora, New York,
Respondent-Appellee.

BRIEF FOR RESPONDENT

Questions Presented

1. Was petitioner's arrest predicated on probable cause where an informer's tip and corroborative evidence obtained by police investigation established reasonable grounds for believing that petitioner was a participant in a narcotics mill operation?

2. Was the unannounced entry into the premises by police officers justified where the mill operation involved a large number of people, evidence was subject to immediate destruction and the risk to the personal safety of the police officers was considerable?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York, dated June 6, 1974 (BONEAL, J.), which denied petitioner's

application for a writ of habeas corpus. The District Court granted petitioner leave to appeal *in forma pauperis* and a certificate of probable cause.

Facts

Petitioner's conviction arose out of a police raid of an apartment in the Bronx on January 23, 1970 during which more than ten pounds of heroin were seized. Prior to trial, petitioner and his codefendants moved to suppress the evidence seized on the ground that it had been obtained as a result of an unlawful search and seizure. On June 18, 1970, Justice Brust granted the motion to suppress the evidence. This order was reversed by the Appellate Division, First Department on March 25, 1971. 36 A D 2d 177 (1971). The New York Court of Appeals affirmed. 30 N Y 2d 634 (1972). On October 19, 1972 petitioner pleaded guilty to the crime of criminal possession of a dangerous drug in the first degree and was sentenced to a term of from 8½ to 25 years.

In this federal habeas corpus application, petitioner again challenges the constitutionality of the seizure of heroin.

The Hearing

On January 23, 1970, the police raided apartment 3H at 1874 Loring Place in the Bronx, arrested petitioner and his co-defendants and seized more than ten pounds of heroin (Roche 36, 128).^{*} The investigation which culminated with these arrests had begun almost three months to-the-day earlier with the receipt at Narcotics Division Headquarters of an anonymous telephone call on October 24, 1969 (Roche 37, 42; Strano 257).

^{*} References are to pages of the stenographic minutes of the hearing as reproduced in the Record on Appeal, subpoenaed for use by this Court.

That unknown informant had given the police the names and addresses of four women, allegedly involved in the trafficking of narcotics, two of whom were said to be "mill operators". All four were co-defendants of the petitioner. Those women were Naomi Bostick (also known as Chalky) and Beverly Massey (also known as Chalky Jr.), both of 866 Elsmere Place, apartment 2E, and Marcelle Thomas and Robbie Taylor, who both resided at apartment 6A, 90 West 164th Street (Roche 46; Strano 257-258).

With the receipt of this information Detectives Roche, Volpe, and Strano and Patrolman Picciano, all of the Special Investigating Unit of the Narcotics Division of the New York City Police Department, commenced an investigation at these locations (Roche 46; Strano 258).

While in the vicinity of 866 Elsmere Place that day, Detective Roche was approached by an unknown male who apparently recognized him as being a police officer, and offered to help by providing information. That man stated that there were a couple of girls on the second floor of 866 Elsmere Place that were selling junk (Roche 49-50; Strano 258-259). The officers then ascertained that Beverly Massey and Naomi Bostick did live in apartment 2E, after which they continued to keep the location under observation, and saw Beverly Massey enter and leave that apartment on several occasions (Roche 53).

Again on October 25, 27, and 28, 1969, the officers kept the premises 866 Elsmere Place and 90 West 164th Street under surveillance and observed various females including the four suspects enter and leave the apartments (Roche 53-54, 65, 157-159, 162-163). On October 27, 1969, Detective Roche checked the Bureau of Identification records on Naomi Bostick and Beverly Massey, and learned that both had been previously arrested and convicted for narcotic violations (Roche 54, 56, 64).

On October 29, 1969, the surveillance of Naomi Bostick's apartment finally produced results. That afternoon, Miss

Bostick was followed from Elsmere Place to the vicinity of 173rd Street and Walton Avenue where she met a man known to the police as Charles Harris. They both entered 1764 Walton Avenue and proceeded to apartment 3G. The officers placed themselves in the third floor hallway of that building and sometime later observed Naomi Bostick open the apartment door carrying 75 glassine envelopes of heroin. She was immediately placed under arrest, and inside the apartment Detective Roche saw various quantities of white powder, cutting paraphernalia, glassine envelopes, rubber bands and other items commonly used for the cutting and packaging of heroin for street distribution (Roche 66-71, 84, 102-103; Strano 261-262). Three other persons also present in the apartment were likewise arrested for their complicity in that "mill operation", including Charles Harris, the man Miss Bostick had met on Walton Avenue earlier that day, and more than a pound of heroin was seized (Roche 104; Strano 262).

Following that arrest, Detectives Roche and Strano had a conversation in the station house with Charles Harris and Orasio Jackson, another participant in that "mill operation". Jackson stated they might not have been caught had the other girls—one of whom he mentioned as Beverly Massey—shown up because the operation would then not have taken so long (Strano 263). Jackson also asked if the police could give Naomi Bostick a break because she was merely a "mill girl", and the narcotics belonged to him (Roche 106; Strano 263).

Narcotics officers again began to work on this investigation on November 17, 1969, when they received word from Manhattan Homicide Detectives that Orasio Jackson had been shot in the head and his wife and daughter killed, apparently over a dispute involving narcotics (Roche 106-107; Strano 264). Then, on January 5, 1970, Detective Strano spoke to one of his confidential informants to see if he could supply any information relative to the activi-

ties of Naomi Bostick or Beverly Massey (Strano 264-265). This informant had been used in the past on several investigations and on one occasion had given information which led to the arrest of three individuals for violation of the narcotics laws (Strano 265, 297-298, 301). This informant stated that he believed these girls to be ones that frequented a bar on 116th Street and Fifth Avenue in Manhattan, that they were known by the name of Chalky, and that they and their friends were in the habit of dressing in masculine attire (Strano 265-266). Strano asked the informant to check further and the next day the informant identified their pictures and stated that they were active in "bag-ups" or "mills" (Strano 266).

At this time the police reinstituted their surveillance of 866 Elsmere Place, apartment 2E, and continued it from January 5 until January 23, the day of the arrest (Roche 108; Volpe 244-249; McCrorie 334). During this period of time, the officers saw numerous females, either in the company of Naomi Bostick or Beverly Massey, entering and leaving their apartment. Some of these persons were defendants in the pending case and were recognized by the officers on the morning of January 23, 1970, entering 1874 Loring Place, among them Robbie Taylor, Marcelle Thomas and Mary Townsend (Roche 112-113, 179-180; Volpe 225, 226; Strano 276, 280; McCrorie 337).

On January 14, 1970, Detective Strano again spoke to his informant and he stated that "'something was in the wind. The girls were getting ready'" (Strano 267). The next day the informant stated "'it might be going down * * * very possibly at 866 Elsmere'" (Strano 267). On January 16, 1970, the police waited in the vicinity of Elsmere Place from early in the morning until 6:00 P.M., when Strano again contacted his informant and was told "'It is off. I don't know what happened but all the girls are out in the street'" (Strano 267).

On January 20, 1970, the informant again stated that they were ready, this time for a big operation, that there would

be a lot of girls involved and it would take a long time. He also said that the mill would not be in the usual location and he would attempt to ascertain where it would be located (Strano 267). The next day, January 21, 1970, Detective Strano and Detective Hassell, another member of the team, followed Beverly Massey from Elsmere Place to the corner of Loring Place and Burnside Avenue, where she entered a building. That same evening, Strano once more contacted his informant, who said: "'It is really hot. It is going. The girls are moving. They are all happy. They are going to make money'". Strano then asked what the informant knew about "Loring Place and Burnside". He hesitated momentarily then asked if that was a big corner building. Strano said it was, to which the informant stated: "'There is a girl that lives in there, they call Tess, but she has a lot of nicknames and she is involved in all kinds of games'" and her apartment has been used before by these same people. He also indicated he would attempt to come up with some more definite information (Strano 268-269).

On January 22, 1970, Strano spoke to the informant for the last time. He stated "'Everything is go. They are all ready. It is going to be a big one. Be careful and good luck'". He also confirmed the address and apartment number once again [although at this stage of his testimony Detective Strano could not remember the exact apartment number mentioned by the informant, he did recall it to have been on the third floor, and the apartment actually raided was number 3H (Roche 36; McCrorie 338)].

Detective McCrorie, prior to entering the premises on January 23, 1970, ascertained, through a name on the downstairs doorbell of apartment 3H and verification via the phone company, that the occupant of said apartment was one Tessie Truehart (McCrorie, 338-339) [A copy of the lease, which was received into evidence as People's Exhibit 20, however, shows the name of the tenant to be Terry L. Sutton (340)].

Early the next morning, January 23, 1970, Narcotics Detectives took up positions in the vicinity of 866 Elsmere Place and 1874 Loring Place. Detectives Roche and Hassell stationed themselves at 866 Elsmere Place (Roche 109), while Detectives Volpe, Strano, and McCrorie and Patrolman Picciano were making observations at Loring Place, Detective Volpe being the liaison between the teams at the two locations (Volpe 215-216; Strano 270, McCrorie 323). At approximately 7:45 A.M. Detectives Strano and McCrorie, who were positioned across the street from 1874 Loring Place in an unmarked police truck, saw a female, later identified as the defendant, Ann Brown (Strano 273), enter the premises, and they took a photograph of that scene (People's Exhibit 13 in evidence; Strano 270). Numerous other females were also seen entering the building, some of whom—Mary Townsend, Marcelle Thomas and Robbie Taylor—were recognized as having been seen in the presence of Naomi Bostick and Beverly Massey on numerous previous occasions. Photographs were also taken of some of these people (People's Exhibits 7, 9, 10, 11, 13, 18, in evidence; Strano 276, 277-280; Roche 112-113, 179-180; McCrorie 337).

At 8:00 A.M. Strano and McCrorie observed a Buick with New Jersey registration parked on the corner of Burnside and Loring Place, and a male Negro, later identified as the defendant Joseph Powell, emerged from the driver's side of the car and walked to the rear of that vehicle. He stood there for several minutes, looking up and down the street. Beverly Massey then came out of 1874 Loring Place and approached Powell. The two engaged in a short conversation, looked around the street again, after which Powell opened the trunk of the car, and took out a suitcase, a cardboard box and a brown paper bag. They then carried these articles into 1874 Loring Place (Strano 271-272; McCrorie 322-323, 324-325, 328-329). Photographs (People's Exhibits 12, 14, 15, 16, 17, 8 and 6 in evidence) were also taken of these events, and both officers, based

upon their experience in the Narcotics Division of the New York City Police Department, and specifically their expertise in the manner of operation of narcotic "mills", testified that in their opinion the suitcase, box and paper bag contained narcotics and cutting paraphernalia, and that the girls seen entering the premises were there for the purpose of "bagging up", or mixing and packaging narcotics (Strano 256-257, 288; McCrorie 323, 324, 327, 332; see also Roche 127). Specifically, Detective Strano stated that "as is usual in a mill case" the girls arrive first before the narcotics is delivered, and "when a man pulls up, he was met by one girl who usually runs the mill" (Strano 288).

Meanwhile, at Elsmere Place Detectives Roche and Hassell were observing Naomi Bostick leave her apartment with another female, subsequently identified as defendant Linda Ranson, and enter a taxicab (Roche 109-111). Roche then placed a call to Patrolman Picciano to let him know that Bostick was on her way, after which he and Hassell proceeded to Loring Place (Roche 111). Detective Volpe, who was in radio communication with Strano and McCrorie, passed on this message (Volpe 217), and was also informed that Strano had observed females in masculine dress enter the building, and it looked like "'it is going off'" (Volpe 216-217). Upon arriving at the location, Roche was told by Strano that some of the girls had already entered and "'The mill is going'" (Roche 115). From 9:00 A.M. until approximately 10:30 A.M. Roche, along with Strano and McCrorie, observed several females enter 1874 Loring Place, and as indicated earlier, recognized some of them from previous surveillance on the case (Roche 112-113, 179-180).

At this time, Detective McCrorie entered the building to take a look at the door in order to determine how difficult it would be to break (McCrorie 335; Strano 281-282; see also People's Exhibit 49 in evidence). While at the door, McCrorie heard numerous female voices inside the

apartment after which he proceeded to the roof to check that door and was informed by radio that two more girls had just entered the premises (Strano 283; McCrorie 335-336). McCrorie then took up a position a half landing above apartment 3H and observed two female defendants—Mary Townsend, whom McCrorie recognized but whose name he did not know at that time, and defendant Denilda Frank—approach the apartment and knock on the door. One of them identified herself as “Mary” and, after a rattling of chains and unlocking of doors, they entered apartment 3H (McCrorie 336-337). McCrorie then went back to the truck and informed Strano that “‘the place is loaded, sounds like it’s going right now’” (Strano 285).

At approximately 10:30 A.M. Naomi Bostick was seen entering the premises carrying two shopping bags of food (Roche 114).

At approximately 12:30 P.M., McCrorie again entered 1874 Loring Place, this time with his brother officers, and while they proceeded up the left staircase, McCrorie went to the right, and proceeded to the roof where he opened the door to let his fellow officers in. As he passed by apartment 3H he heard someone say “‘Hey Chalky’” (McCrorie 341). After unlocking the roof door for his brother officers, they proceeded to apartment 5H to observe the layout of the apartment (McCrorie 341; Roche 116). His brother officers then proceeded back to the roof in order to come down the fire escape, and McCrorie went downstairs. As he passed by apartment 3H, he heard a voice inside say “‘Hey Beverly, is the food ready?’” (McCrorie 341).

Finally, at 1:00 P.M., Roche, Strano, Volpe, and Picciano proceeded down the fire escape to the bedroom window of apartment 3H, while McCrorie, Hassell and Sergeant Stefans waited in the hallway. The four officers entered through the bedroom, weapons in hand, and in the living room saw the female defendants seated around a table on

which was a quantity of white powder (Roche 116-123; Volpe 218-222). The two male defendants were standing at the far end of the table mixing quantities of white powder (Roche 125; Volpe 221). Piles of white powder were situated in front of the females, and this powder was being put into glassine envelopes, which were in turn being sealed with scotch tape and in all, some fifteen thousand glassine envelopes were seized (Roche 123-127). In short, these defendants were found actively engaged in the operation of a narcotics mill, in which some ten pounds of heroin were being mixed and bagged for street distribution (Roche 127-128; Volpe 222; Strano 288).

Opinion Below

After an extensive review of the evidence at the state court hearing, the District Court concluded that the combination of the informer's tip and the corroborative evidence obtained by police investigation was sufficient to establish probable cause to arrest the petitioner.

The District Court observed that during the course of a three month investigation, the officers had been told by at least three different sources that Massey and Bostick were active in narcotics traffic. Both had arrest and conviction records for narcotics violation and during the course of the three month investigation, Bostick was arrested after emerging from an apartment in possession of heroin filled glassine envelopes.

On January 5, 1970, Officer Strano asked a confidential informant to assist him in the investigation. He was informed that both Massey and Bostick used the nickname Chalky, that they and their friends dressed in men's clothing and that Massey and Bostick were active in mills. The informant recognized the Loring Place address and stated that a girl named Tess lived there. On January 22, the informant stated that mill would start early on Janu-

ary 23, 1970 in apartment 3H at Loring Place. Police investigation revealed that Tessie Trueheart was the occupant of apartment 3H.

The informant's tip was additionally corroborated by police investigation on the morning of January 23 at the time and place stated by the informant. Petitioner arrived about 8 A.M., emerged from his car, walked to its rear and stood there suspiciously looking up and down the street. Massey emerged from Loring Place and after both she and the petitioner looked around, petitioner opened the trunk of the car, took out a cardboard box, a paper bag and a valise. These items were carried into 1874 Loring Place. Significantly, during the next few hours, numerous women, some of whom were known to the police as associates of Massey and Bostick and some of whom were in men's clothing entered 1874 Loring Place. Bostick also arrived. Prior to entry, the police overheard a lot of female voices in the apartment and the nickname Chalky and the name Beverley. These events corroborated the tip and together with the tip were sufficient to establish probable cause for believing a narcotics mill was operating in apartment 3H at Loring Place on January 23, 1970.

The District Court further concluded that the unannounced entry of the police into apartment 3H was justified by the exigent circumstances and that the officers did not violate petitioner's rights under the Fourth Amendment. The Court observed that the police were presented with a situation involving a large number of people, the possibility of destruction of evidence and considerable risk to their personal safety.

ARGUMENT

The police had probable cause to arrest petitioner, properly entered apartment 3H at 1874 Loring Avenue, and constitutionally seized evidence therein.*

The minutes of the hearing clearly establish that the search and petitioner's arrest were constitutionally valid. The seizure challenged herein was the culmination of a three month investigation which had begun with the receipt at Narcotics Headquarters of an anonymous telephone call regarding the alleged activities of four women. During the course of this investigation, which focused on an apartment at 866 Elsmere Place, four women were arrested, Naomi Bostick, Beverly Massey, Marcelle Thomas, and Robbie Taylor, all petitioner's codefendants, for a narcotics mill operation on Walton Avenue in the Bronx.

Subsequently, on January 5, 1970, the surveillance of the Elsmere Place apartment was reinstated. As the same time, Detective Strano contacted one of his confidential informants for help in obtaining additional information regarding illicit activities of the individuals who frequented this apartment. Such help was given when on January 21, 1970, after Beverly Massey was followed to a building on the corner of Loring Place and Burnside Avenue, the informant stated that apartment 3H in that building, occupied by a girl named Tessie, had been used before as a site for the cutting and packaging of heroin. On the following day Detective Strano was informed that the apartment

* The District Court relying on *U.S. ex rel. Newsome v. Malcolm*, 492 F. 2d 1166 (2d Cir. 1974), held that petitioner was not precluded from raising the seizure of evidence by way of federal habeas corpus. This issue is now before the United States Supreme Court, *Lefkowitz v. Newsome*, 73-1627, and will be argued shortly. It is respondent's position here, as set forth in the District Court, that petitioner, by his plea of guilty, waived his challenge to the constitutionality of the seizure.

would in fact be used early next morning for a large scale narcotics packaging operation.

At that, Detective Strano obtained a search warrant for that apartment, and early on January 23, 1970, the officers proceeded to that location to execute the warrant. Upon arrival they began to observe numerous females entering the building, including Marcelle Thomas, Robbie Taylor and one Mary Townsend, whom the police had seen during the surveillance of Elsmere Place. Photographs were taken of the arrival of some of those girls, all defendants in this case. Prior to entry it was determined that these girls had proceeded to apartment 3H, and independent investigation verified the occupant to be one Tessie Truhart. Later in the morning Miss Bostick was also seen entering the building.

At one point Beverly Massey was observed leaving the building and meeting the defendant Joseph Powell in the street. The two looked furtively up and down the street for several minutes, and then carried a suitcase, cardboard box and paper bag from the trunk of Powell's car to the building. Shortly thereafter, the police entered the apartment through a bedroom window, arrested the defendants and seized the contraband.

Based on the cumulative effect of the informant's tip, the reputation of the individuals involved and the activities just prior to the arrests, the police had ample probable cause to search apartment 3H and arrest the occupants, including the petitioner. *U.S. v. Canieso*, 470 F. 2d 1224 (2d Cir. 1972); *U.S. v. Manning*, 448 F. 2d 992 (2d Cir. 1971) (on rehearing en Banc). All that is constitutionally required is that the detectives themselves know enough from their own surveillance and corroboration of suspicious facts to show that there is a real likelihood of a factual basis for an informant's information, and even if a tip standing alone is insufficient to validate a search, such failure does not remove the tip altogether from con-

sideration but simply means that other corroborative detail will be necessary to constitute probable cause. *U.S. v. Canieso, supra*, at 1231.

Here the police knew Naomi Bostick and Beverly Massey to be "mill girls" prior to the receipt of any information from the informant, and had followed Beverly Massey, a prime suspect in the three-month investigation, to the apartment house in which the informant said the operation would be conducted. At the time specified by the informant, other girls began arriving at this new location, including two other suspected "mill girls"—Marcelle Thomas and Robbie Taylor. Additionally, Mary Townsend, who had been previously seen in the company of Naomi Bostick, was seen entering the very apartment named by the informant, and the names "Chalky" and "Beverly" were both heard emanating from that apartment. Moreover, the name of the tenant of that apartment as given by the informant was verified prior to entry. Naomi Bostick, as well, was later seen entering the building, thus accounting for all the main suspects.

This unusual activity of known and suspected narcotic violators early on a Friday morning in an apartment owned or occupied by none of them, is suspicious enough in and of itself, but when combined with prior information that precisely such activity would take place, and for the sole purpose of mixing and "bagging" narcotics, it surely ripens into probable cause to believe that such an illicit enterprise was in fact being conducted. Add to this the arrival at the suspect apartment of other females in masculine dress—the informant had previously indicated Miss Bostick's cohorts were in the habit of wearing masculine dress (Strano 265-266)—and the suspected mill appears to be more of a certainty. Indeed, the officers at the scene were subjectively positive that the mill was in operation long before the actual entry into the apartment (Volpe 216-217; Roche 115; Strano 285).

Lastly, but perhaps most importantly, is the arrival of Joseph Powell. These police officers, trained experts in the field of narcotics, knew that, as is usual in mill operations of this suspected size, the narcotics are delivered to the location at the time it is to be cut, and not before (Strano 288). Beverly Massey, following the usual pattern, met Powell in the street and together they carried the contraband into the building. Powell's suspicious activity in looking up and down the street prior to Massey's arrival as well as afterward, added strength to the officer's belief that he was the courier. Finally, the entry into the trunk of the car only after a second furtive observation of the scene indicated such a move was safe, and the removal of the suitcase, box and paper bag, reasonably confirmed, in these officers' minds, that the expected delivery was then taking place.

At this stage, and certainly after subsequent observations confirmed the arrival of Bostick and others into apartment 3H, the police could not have been more certain of the activity being carried on in that apartment, had they actually seen narcotics in that suitcase. There can be no doubt that this observation of activities following the classic pattern of a well-organized narcotics mill operation, complete with known "mill girls", suspected "mill girls" and others who probably were "mill girls", which verified to the letter prior information that just such an activity would be taking place, constituted probable cause for the arrest of such participants. In other words, having verified everything the informant said except the existence of the contraband, it was reasonable for the police to believe that that information was likewise accurate *Draper v. United States*, 358 U.S. 307 (1959); *United States v. Acosta*, 411 F. 2d 627 (5th Cir. 1969); *Smith v. United States*, 385 F. 2d 34 (5th Cir. 1967); *United States v. Irby*, 304 F. 2d 280 (4th Cir. 1962), *cert. den.* 375 U.S. 958 (1963); *Sabbath v. United States*, 380 F. 2d 108 (9th Cir. 1967), *cert. den.*

389 U.S. 1003 (1967); *Jones v. United States*, 271 F. 2d 494 (D.C. Cir. 1959), *cert. den.* 362 U.S. 944 (1959); *Rodgers v. United States*, 267 F. 2d 79 (9th Cir. 1959).

In the instant case, the only probable and reasonable inference to be drawn under all the circumstances mentioned above is that the individuals present that morning were there to engage in the illegal activity of cutting and packaging heroin. *U.S. v. Manning, supra*, 999. As such, the police had every right to enter that apartment in order to effectuate the arrest of these defendants.

Alternatively, the arrests herein and ensuing search could have been predicated on the informant's tip alone. It is well established in this Circuit that an informant is reliable if he furnishes information that checks out irrespective of whether his tips have led to past convictions. *U.S. v. Commission*, 429 F. 2d 834 (2d Cir. 1970).

In order to demonstrate probable cause for an arrest on the basis of information received from an anonymous informant alone, some of the underlying circumstances from which the officer concluded that the informer was credible or his information reliable and some of the underlying circumstances from which the informant drew his conclusion as to the guilt of the defendant must be presented. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969). In so presenting "some of the underlying circumstances" from which the informer's credibility or reliability is concluded, it is not necessary to prove that reliability by any given, familiar or convenient standard.

In the case at bar, the informant had previously given information on one occasion leading to the arrest of three individuals, and had otherwise been used by Detective Strano during the course of other investigations (Strano 265, 297-298, 301). While Detective Strano did not indicate whether his information in those cases had been reliable, a common-sense reading of the affidavit and of the hearing

minutes [see *e.g.*, *United States v. Ventresca*, 380 U.S. 102 (1965)] indicates that such was in fact so, for why else would Strano have approached him for information in this case. Moreover, the fact that Strano first asked the informant for help obviates the possibility that the information was given to that officer merely out of spite, vengeance or hatred of the suspects, and thus adds to its truthfulness.

The reliability of the informant is demonstrated by the fact that all of the preliminary information given prior to January 22, 1970, was substantiated by the police officer's own knowledge of the suspects. Thus the informant's statement that the nicknames of Massey and Bostick were "Chalky", his knowledge of their address—866 Elsmere Place—and his characterization of them as "mill girls" (Strano, 265-266, 267) were all consistent with Strano's previous information, again indicating the trustworthiness of both the informant and his information.

Here the informant gave the exact location of the mill—apartment 3H—together with the name of the tenant of that apartment, and the time the mill was to begin operation (Strano, 268-269). Additionally, this information was relative to an apartment not occupied or usually used by the defendants. Certainly, this is the type of detailed information contemplated by the Court in *Spinelli v. United States*, *supra*, when it said:

In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation [*Id.* at 416].

This information must have been obtained by the informant in a reliable way, for it is not the type of report

that could "easily have been obtained from an offhand remark heard at a neighborhood bar" [*Id.* at 417]. Someone contemplating the cutting and packaging of ten pounds of heroin would not allow the details of his proposed venture to be known to any but the closest of confederates or co-conspirators. It is thus obvious that the information imparted to Detective Strano was reliable, even before those details were independently verified by the police.

The detail provided here is not unlike that in *Draper v. United States*, 358 U.S. 307 (1959), cited by the *Spinelli* Court as an example of the type of detail it would like. There the informant, who had been used by the police for six months as a paid informant, and who had given information "from time to time", *Draper v. United States*, *supra*, at 309, stated that the defendant would be returning to Denver from Chicago by train on one of two mornings, dressed in a specified manner, carrying a brief case and three ounces of heroin. There, as here, the details of the information set it apart from the category of rumor and could lead a magistrate to "reasonably infer that the informant had gained his information in a reliable way", *Spinelli v. United States*, *supra*, at 417.

Similarly, in *United States v. Acarino*, 408 F. 2d 512 (2d Cir. 1969), *cert. den.*, 395 U.S. 961 (1969), that Court held that an informant's tip that the defendant would make a delivery of heroin at a specified time and place and to a specified person was specific enough to take the tip out of the category of rumor [*Id.* at 514]. Moreover, the Court was also of the opinion that the informant's statement of "personal" knowledge of the prepared delivery added to the conclusion that his information had been obtained in a reliable manner. *Acarino* is thus practically on all fours with the instant case, where the informant stated a mill operation would be conducted by Naomi Bostick, Beverly Massey and others, at a specified apartment, owned by a specified person, at a specified time.

In sum, the police had probable cause to arrest the defendants. Moreover, as the District Court held, at the time of the entry into apartment 3H, the police were faced with a situation involving a large number of people, the possibility of a loss of evidence, and risk to their personal safety. Thus the unannounced entry into the apartment was justified given the exigencies of the situation. *Ker v. California*, 374 U.S. 23 (1963).

CONCLUSION

The order of the District Court should be affirmed.

Dated: New York, New York, October 30, 1974.

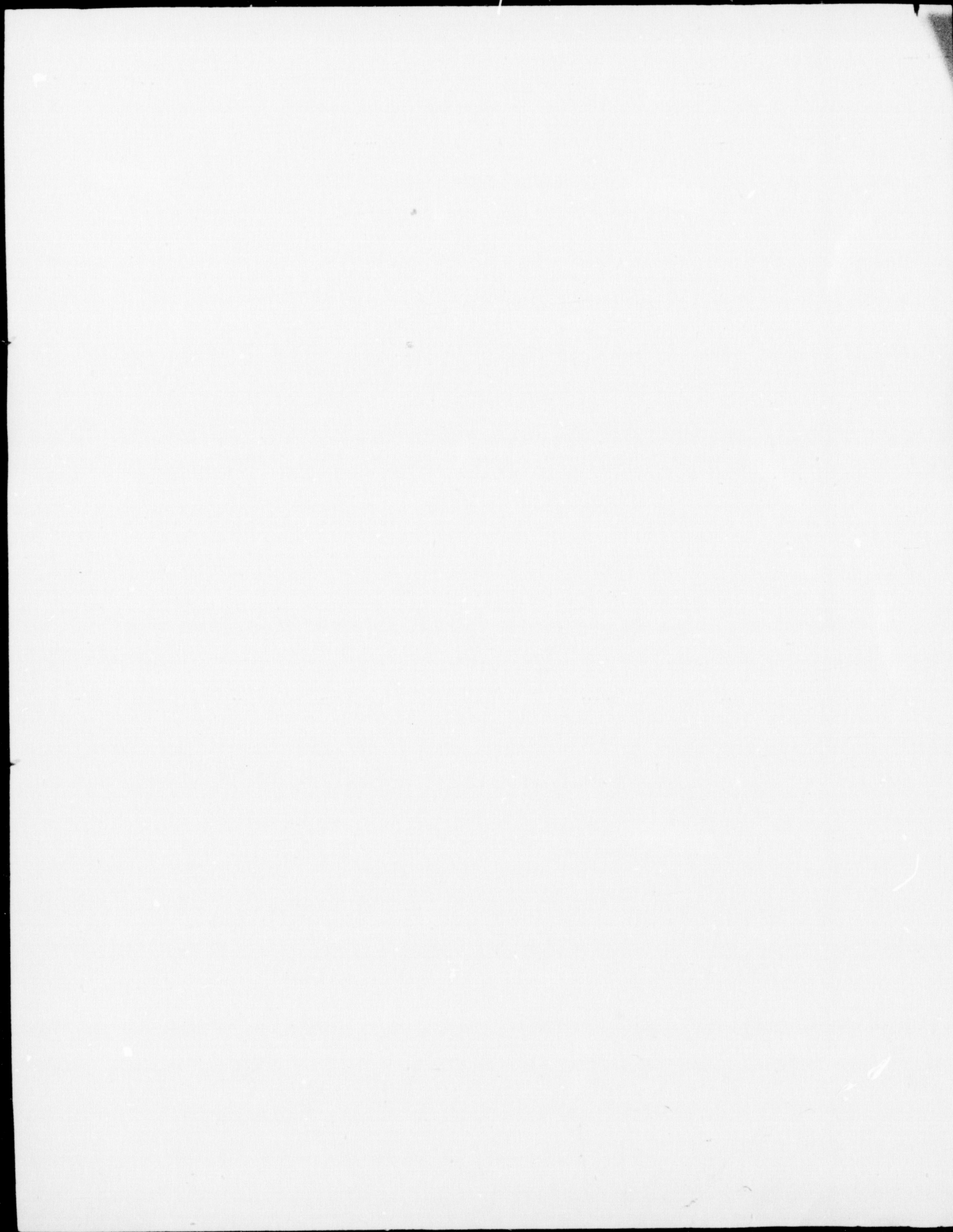
Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellant
2 World Trade Center
New York, New York

Of Counsel

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General



STATE OF NEW YORK)

: SS. :

COUNTY OF NEW YORK)

Greene R Silverman

, being duly sworn, deposes and

says that he is employed in the office of the Attorney

General of the State of New York, attorney for

herein. On the 30th day of October, 1974, she served the annexed upon the following named person :

The Legal Aid Society

Federal Defender Unit

509 US Courthouse

Foley Square ny ny 1007

Attorney in the within entitled *appeal*

by depositing

a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the

Government of the United States at Two World Trade Center,

New York, New York 10047, directed to said Attorney at the

address within the State designated by ~~them~~ for that

purpose.

Julene P Selberman

Sworn to before me this

30th day of October, 1974

C. E. Hornwall

Assistant Attorney General

of the State of New York